BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JESUS ESCARCEGA	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,338
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	
AND	)	
	)	
WAUSAU INSURANCE COMPANIES	)	
Insurance Carrier	)	

ORDER

Claimant appeals the June 21, 2001, review and modification Decision of Administrative Law Judge Pamela J. Fuller. Claimant was denied a work disability in this matter after claimant failed to establish that he was wrongfully discharged from his employment with respondent. The Administrative Law Judge found claimant's actions leading up to his discharge were not in good faith and, therefore, imputed the wages claimant was earning with respondent pursuant to K.S.A. 1998 Supp. 44-510e. As a result, claimant's award was limited to his functional impairment.

Claimant contends the termination was wrongful and claimant should be entitled to a work disability. Respondent, on the other hand, requests that the award be affirmed. This matter was placed on the summary calendar at the request of the parties.

APPEARANCES

Claimant appeared by his attorney, C. Albert Herdoiza of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, D. Shane Bangerter of Dodge City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations contained in the award of the Administrative Law Judge. The stipulations in the award specifically refer to the Agreed Award entered December 8, 1999, and those stipulations contained in the transcript of proceedings dated July 25, 2000.

ISSUES

What is the nature and extent of claimant's disability? More particularly, should claimant's refusal or inability to provide a urine sample as required by respondent's internal employment policy prohibit claimant from a work disability in this matter?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant originally suffered accidental injury on October 26, 1998, while working for respondent. This matter proceeded to Agreed Award on December 8, 1999, at which time claimant and respondent stipulated to claimant's entitlement to a 19.5 percent permanent partial disability on a functional basis.

On August 7, 1999, claimant, while undergoing a random drug test, tested positive for alcohol. Respondent's policy required that, if claimant was to retain his employment, he must agree to participate in a random drug test program for one year. Claimant was required to provide a minimum of one urine sample per month for twelve months and could be required to provide drug samples as often as weekly. The sampling was, otherwise, to be done on a random basis.

Prior to April 3, 2000, claimant had provided ten samples at respondent's request. The evidence in the record indicates that claimant, at no time, was able to provide a urine sample when it was first requested. Claimant, on every occasion, had to return at least a second time and, on more than one occasion, had to return for a third attempt before he was able to provide the urine sample.

On two prior occasions, respondent's assistant personnel director Darren Tharp was present in the bathroom when claimant provided the urine sample. Mr. Tharp's presence was necessitated by claimant's inability to provide urine samples on those dates when first asked.

On April 3, 2000, claimant was again unable to provide a urine sample when it was initially requested. This first request occurred early on the morning of claimant's shift. Claimant was instructed to return to the nurse's station on his first break to provide a sample. Again, claimant was unable to urinate. Claimant then returned to the nurse's station on the second break, at which time he advised them he still was unable to urinate. Claimant alleged that he was unable to urinate during the second break because Mr. Tharp was present in the bathroom with him.

Mr. Tharp was not present the first and second times claimant was provided the opportunity to provide the sample.

Claimant testified that, on a different break, he had gone to the bathroom and urinated without providing a sample to the nurse's station.

Claimant was instructed that, if he failed to provide a urine sample on April 3, 2000, his employment would be terminated. This was pursuant to the respondent's policy and pursuant to the agreement entered into between claimant and respondent after the initial positive test of August 7, 1999.

Claimant was unable to provide a sample on April 3, 2000, even though he made multiple visits to the nurse's station. Thereafter, claimant was terminated.

After the termination, claimant's attorney became involved in the conflict. At the request of claimant's attorney, claimant was provided a second opportunity to provide a urine sample to respondent. Claimant returned to respondent's plant on April 17, 2000, for this second chance. Once again, even though provided multiple opportunities over a period of several hours, claimant was unable to provide a urine sample to respondent.

Claimant contended he was unable to provide a urine sample because Mr. Tharp, who was in the bathroom with him, was what claimant described as a "penis watcher". Claimant testified that he was unable to urinate in the presence of another male and further claimed that he had never, in his life, gone into a public restroom when another man was present.

But Mr. Tharp testified that, on two other occasions, he had been present in the bathroom when claimant provided a urine sample. This was pursuant to respondent's policy. When an employee, who is involved in the random drug sample policy after being tested positive, fails to provide a urine sample when requested, Mr. Tharp can then be present in the room in order to insure the validity of the test.

Claimant was unable to provide a sample on April 17, 2000. Therefore, claimant's termination was allowed to stand.

Claimant was thus awarded the 19.5 percent whole body permanent disability on a functional basis pursuant to the Agreed Award of December 8, 1999. Based upon the Administrative Law Judge's finding of a lack of good faith on claimant's part to retain his employment, claimant was denied a work disability award.

K.S.A. 1998 Supp. 44-510e(a) prohibits compensation for a work disability if a claimant is earning 90 percent or more of his or her average gross weekly wage computed as of the date of accident. The Kansas appellate courts, beginning with Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), bar a claimant from a wage loss compensation if the claimant is capable of earning 90 percent or more of his pre-injury wage within the medical restrictions placed upon him,

but fails or refuses to do so. The Court's intention is to prevent a claimant from refusing work and, therefore, exploiting the workers' compensation system. Foulk and its progeny are concerned with a claimant who is able to work, but refuses to do so. Oliver v. Boeing Co., 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 886 (1999).

In Foulk, an employee refused an employer's offer of accommodated employment and then claimed she was entitled to a work disability. This request was denied after the appellate court found that to construe K.S.A. 44-510e(a) in this manner "would be unreasonable where the proffered job is within the worker's ability and the worker has refused to even attempt the job." Id. at 284.

The Court went on to state:

> . . . it would be unreasonable . . . to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. Id. at 284.

In Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), the Kansas Court of Appeals stated:

> In attempting to harmonize the language of K.S.A. 44-510e(a) with the principles of *Foulk*, we find the factfinder must first make a finding of whether a claimant has made a good faith effort to find appropriate employment. If such a finding is made, the difference in pre- and post-injury wages based on the actual wages can be made. This may lead to a finding of lesser wages, perhaps even zero wages, notwithstanding expert opinion to the contrary.
>
> If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. Id. at 320.

Kansas courts have found that, under certain circumstances, a worker is precluded from obtaining permanent partial disability compensation. Ramirez v. Excel Corp., 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* ___ Kan. ___ (1999).

In this instance, the Administrative Law Judge found claimant had failed to put forth a good faith effort to maintain or obtain employment. The Appeals Board agrees. Claimant's obligation to respondent under the random drug screening agreement was to provide, at the very least, a monthly urine sample for drug testing for one year. Claimant was aware at the time the agreement was entered that a failure to provide a sample would constitute grounds for immediate termination. Claimant was given multiple opportunities

on April 3, 2000, and again on April 17, 2000, to provide the urine sample. For what the Board finds were invalid reasons, claimant refused to do so. This led to claimant's termination. Claimant's explanations for not providing a sample are not credible.

The Board finds, from the evidence presented, that claimant failed to make a good faith effort to maintain his employment with respondent, and, pursuant to Foulk and Copeland, the Appeals Board will impute to claimant the wages he was earning with respondent at the time of his termination. As those wages constituted a wage comparable to that being earned by claimant at the time of his original injury and as those wages would be equal to 90 percent or more of claimant's gross average weekly wage at the time of the injury, claimant is limited to his functional impairment of 19.5 percent to the body as a whole pursuant to K.S.A. 1998 Supp. 44-510e. Therefore, the award of the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Decision of Administrative Law Judge Pamela J. Fuller dated June 21, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I disagree with the majority's conclusion that claimant's inability to urinate was tantamount to bad faith. Accordingly, the post-injury wage for the wage loss prong of the

permanent partial disability formula should be based on claimant's actual post-injury wage for the period that he actively pursued other employment, followed by an imputed wage based upon claimant's wage-earning ability for any period that he stopped looking for employment.

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director